THE HON'BLE SRI JUSTICE BILAL NAZKI

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

WRIT PETITION No. 3236 of 2006

Date: 09-06-2006.

Between :

M/s.Bharat Heavy Plate and Vessels Ltd., Visakhapatnam, rep. by its Manager (Legal & Admn.)

…..Petitioner

And

The Assistant Commissioner of Central Excise, Division-II, Visakhapatnam and another.

…..Respondents.

For the petitioner : SRI C.KODANDARAM

For the Respondents : SRI A.RAJASEKHAR REDDY

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> Head Note:

? CITATIONS:

1. AIR 1990 SC 1017

2. AIR 1998 SC 2064

3 AIR 2000 SC 1583

4. AIR 1997 SC 2027

5. AIR 1998 SC 2928

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ORDER : (Per Hon'ble Sri Justice Bilal Nazki)

This writ petition raises a question as to whether the respondents could attach the properties of the petitioner for the purpose of recovery of excise duty. In this writ petition, the petitioner has challenged the attachment proceedings initiated by the respondents vide C.No.V/30/80/2003 Misc.T1, dated 27.1.2006.

The petitioner-Company is incorporated under the provisions of The Companies Act, 1956 and is engaged in manufacture of heavy engineering, equipment for oil refineries, steel plants, fertilizers, defence etc., which are the products listed in the First Schedule of IDR Act, 1951. Petitioner is also a subsidiary unit of M/s.Bharat Yantra Nigham Ltd., which is owned by the Government of India. It commenced its commercial production in the year 1971. The

authorized capital of the petitioner Company is Rs.3500.00 lakhs and the paid up capital is Rs.3379.78 lakhs of equity shares of Rs.1000/- each.

The Company ran into losses and ultimately on 23.8.2004, it approached The Board for Industrial and Financial Reconstruction (hereinafter referred to as 'the Board') under Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as 'the Act') for a declaration that the Company was sick and for grant of a scheme for rehabilitation. The Company was declared a sick Company within the meaning of the Act on 6.10.2005. Attachments were ordered by respondents on 16.1.2006 and 27.1.2006. The State Bank of India was appointed as operating agency under Section 17(3) of the Act with a direction to prepare a viability study report and revival scheme for the Company.

These facts are not disputed. The only question is whether, after declaration of a Company as a sick Company and after appointment of an operating agency in terms of Section 17(3) of the Act, the respondents could use coercive methods in order to recover the dues on account of excise duty.

The contention of the petitioner is that after the declaration that the petitioner-Company was a sick Company, and after appointment of State Bank of India as operating agency, the respondents could not enforce their claims against the Company, whereas the respondents claim that there is nothing in the Act, which would stop them from enforcing the claim of excise, which, in any case, become due at the time of production itself. It is further contended by the respondents that the petitioner has informed the Board in its reference, only the liability of excise arrears payable as on 31st of July 2004, whereas the petitioner has defaulted huge amounts even after that date i.e. 31st of July 2004. In our view, these questions are not *res integra* and there are already judgments of the Supreme Court, which have laid down the principles and interpreted Section 22 of the Act.

Before going to those judgments, it is necessary to go through certain provisions of the Act.

Under Section 3(o) of the Act, 'Sick Industrial Company' has been defined to mean, an industrial Company (being a company registered for not less than five years) which has at the end of any financial year accumulated losses equal to or exceeding its entire net worth.

Under Section 4 of the Act, 'Board' has been established, known as 'Board for Industrial and Financial Reconstruction'.

Under Section 5, the 'appellate authority' is constituted.

Under Section 15, where an industrial Company becomes sick, the Board of Directors of that Company can make a reference to the Board.

Under Section 16, an inquiry has to take place, which is to be conducted by the Board as to whether a Company has become sick or not. On completion of inquiry, a suitable order can be passed by the Board under Section 17 of the Act.

Under Section 17(3), the Board may direct the operating agency to prepare a scheme.

Section 22 of the Act lays down –

"**22. <u>Suspension of legal proceedings, contracts, etc..</u>**

1. Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956, or any other law or the

memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

2. Where the management of the sick industrial company is taken over or changed [in pursuance of any scheme sanctioned under section 18], notwithstanding anything contained in the Companies Act, 1956 or any other law or in the memorandum and articles of association of such company or any instrument having effect under the said Act or other law—

a. it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;

b. no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the Board.

3. [Where an inquiry under section 16 is pending or any scheme referred to in section 17 is under preparation or during the period] of consideration of any scheme under section 18 or where any such scheme is sanctioned thereunder, for due

implementation of the scheme, the Board may by order declare with respect to the sick industrial company concerned that the operation of all or any of the contracts, assurances of property, agreements settlements, awards, standing orders or other instruments in force, to which such sick industrial company is a party or which may be applicable to such sick industrial company immediately before the date of such order, shall remain suspended to that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified by the Board:

Provided that such declaration shall not be made for a period exceeding two years which may be extended by one year at a time so, however, that the total period shall not exceed seven years in the aggregate.

4. Any declaration made under sub-section (3) with respect to a sick industrial company shall have effect notwithstanding anything contained in the Companies Act, 1956 or any other law, the memorandum and articles of association of the company or any instrument having effect under the said Act or other law or any agreement or any decree or order of a Court, tribunal, officer or other authority or of any submission, settlement or standing order and accordingly :--

c. any remedy for the enforcement of any right, privilege, obligation and liability suspended or modified by such declaration, and all proceedings relating thereto pending before any Court, tribunal, officer or other authority shall remain stayed or be continued

subject to such declaration; and

d. on the declaration ceasing to have effect—

i. any right, privilege, obligation or liability so remaining suspended or modified, shall become revived and enforceable as if the declaration had never been made; and

ii. any proceeding so remaining stayed shall be proceeded with subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

5. In computing the period of limitation for the enforcement of any right, privilege, obligation or liability, the period during which it or the remedy for the enforcement thereof remains suspended under this section shall be excluded."

This Section lays down that without the consent of the Board or the appellate authority as the case may be, no proceedings for the winding up of the industrial Company or for execution, distress or the like against any of the properties of the industrial Company or for the appointment of a receiver in respect there of, can be appointed. The requirements for this prohibition are that an inquiry contemplated under Section 16 of the Act should be pending, or a scheme under Section 18 is under preparation, or a sanctioned scheme is under implementation, or an appeal under Section 25 of the Act should be

pending. Admittedly, in the present case, a scheme is under preparation and therefore, in our view, the respondents could have not attached the property belonging to the sick Company.

There has been consistent view of Supreme Court in this regard and reference has been made to a judgment in the case of **The Gram Panchayat v. Shree Vallabh Glass Works Ltd.**. This was a case where dues were sought to be recovered by Gram Panchayat from a sick Company. As in the present case, the Company before the Supreme Court i.e. Messrs. Shree Vallabh Glass Works Ltd. was declared to be a sick industrial Company within the meaning of clause (o) of sub-section (1) of Section 3 of the Act. The Gram Panchayat initiated coercive proceedings under Section 129 of the Bombay Village Panchayat Act to recover a sum of Rs.9,47,539/- stated to be the property tax and other amounts due from the Company. The Company approached the High Court, claiming protection under Section 22 of the Act. The High Court accepted the writ petition and destrained the petitioners from recovering the said amount without the consent of the Board and the matter landed in Supreme Court. In paragraphs 7, 8 and 10, the Supreme Court laid down—

> "7. Section 22(1) provides that in case the enquiry under S.16 is pending or any scheme referred to under S.17 is under preparation or consideration by the Board or any appeal under S.25 is pending then certain proceedings against the sick industrial company are to be suspended or presumed to be suspended. The nature of the proceedings which are automatically suspended are L1) Winding up of the industrial company; (2) Proceedings for execution, distress or the like against the properties of sick industrial company and (3) Proceedings for the appointment of Receiver. The proceedings in respect of these matters could, however, be continued against the sick industrial company with the consent of approval of the Board or of the Appellate Authority as the case may be.

8. Section 16 authorises the Board to make such enquiry as it may deem fit for determining whether any industrial company has become a sick industrial company. Where Board is satisfied that a company has become a sick industrial company, it could give a reasonable time to the company to make its net worth positive (Sec.17(2). Where it is not practicable for sick industrial company to make its net worth positive within a reasonable time, S.17(3) steps in authorizing the Board to direct any operating agency to prepare a scheme in relation to the company. The Board may specify the various measures to be considered by the operating agency. These measures are detailed out in S.18. The operating agency has to prepare a scheme as per the order specified by the Board.

10. In the light of the steps taken by the Board under Ss.16 and 17 of the Act, no proceedings for execution, distress or the like proceedings against any of the properties of the company shall lie or be proceeded further except with the consent of the Board. Indeed, there would be automatic suspension of such proceedings against the company's properties. As soon as the inquiry under S.16 is ordered by the Board, the various proceedings set out under sub-section (1) of S.22 would be deemed to have been suspended."

In the case of **Real Value Appliances Ltd. v. Canara Bank**, the Supreme Court was essentially interpreting Section 16 of the Act along with Section 22. In para 21 it said—

"21. It is to be noticed that according to Section 22, in

case an "inquiry under Section 16" is pending, then, notwithstanding anything in the Companies Act or any other instrument etc., no proceedings for the winding up of the company or for execution or distress or the like against the property of the company or for the appointment of a receiver and

no suit for recovery of money or enforcement of any security or of any guarantee – shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, by the appellate authority. Section 22-A permits the Board to pass certain conditional orders.

Again in Para 23, it stated—

"……..Whether the Company seeks a declaration that it is sick or more other body seeks to have it declared as a sick company, it is, in our opinion, necessary that the Company be heard before any final decision is taken under the Act. It is also the legislative intention to see that no proceedings against the assets are taken before any such decision is given by the BIFR for in case the Company's assets are sold, or the company wound up it may indeed become difficult later to restore the status quo ante……."

Again in the case of **M/s.Rishabh Agro Industries Ltd. v. P.N.B. Capital Services Ltd.**, the judgment in the case of **Real Value Appliances Ltd.** (2nd supra) was relied upon. In para 9, it is stated—

"9. It is true that for invoking the applicability of Section 22 it has to be established that an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or sanctioned scheme is under implementation or an appeal under Section 25 to an industrial company is pending. But it cannot be said that despite existence of any of the aforesaid exigencies the provision of Section 22 would not be attracted after the order of winding up of the company is passed. The words "no proceeding for winding up of the industrial company or for execution distress or the like against any of the properties of the industrial company or for the appointment of Receiver in respect thereof shall lie or be proceeded with further, leave no doubt in our mind that the effect of the section would be applicable even after the winding up order is passed

> as no proceeding even thereafter can be proceeded with further under the Companies Act. The High Court appears to have not taken note of the aforesaid words i.e. to be proceeded with further. As the impugned judgment is based upon wrong assumption of the provision of law and completely ignoring the vital words noticed hereinabove, the same cannot be sustained."

The respondents, on the other hand, relied on a judgment of the Supreme Court in **Dy.Commercial Tax Officer v. Corromandal Pharmaceuticals**. In this case, the Court held—

> "Any step for execution, distress or the like against the properties of the industrial company or other similar steps should not be pursued which will cause delay or impediment in the implementation of the sanctioned scheme. In order to safeguard such state of affairs, an embargo or bar is placed under Section 22 of the Act against any step for execution, distress or the like or other similar proceedings against the company without the consent of the Board or, as the case may be, the appellate authority. The language of Section 22 of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal under Section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc., which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it

> indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against spirit of the statute in a business sense, should be avoided."

Though this judgment was distinguished in another judgment in the case of **Tata Davy Ltd. v. State of Orissa**, but in any case, this judgment would not come to the rescue of the respondents in this case, as even under this judgment, Section 22(1) of the Act can apply to such of those dues reckoned or included in the sanctioned scheme and in the present case, scheme is yet to be sanctioned.

For the reasons given hereinabove, we allow the writ petition and quash the impugned attachment order. However, the petitioner-Company is at liberty to seek remedies available to it in law, after getting permission from the Board.

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(BILAL NAZKI, J)

Date: 09-06-2006

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(G. CHANDRAIAH, J)

N.B:

L.R. copies to be marked.

(B/o)

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